No. 82-1771

IN THE

Supreme Court of the United States

October Term 1983

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALBERTO ANTONIO LEON, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE MINNESOTA STATE BAR ASSOCIATION

Ronald L. Seeger
President, Minnesota State Bar Association
Counsel of Record
Steven H. Goldberg
Suite 403
430 Marquette Avenue
Minneapolis, Minnesota 55401
Bruce H. Hanley
Chairman, Criminal Law Section of the Minnesota State Bar Association
1750 First Bank Place East
Minneapolis, Minnesota 55402

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BRIEF AMICUS CURIAE OF THE MINNESOTA STATE BAR ASSOCIATION

INTEREST OF THE AMICUS CURIAE

The Minnesota State Bar Association is a voluntary organization of the legal profession in Minnesota. Its approximately 10,000 members include prosecutors, public defenders, private lawyers, trial and appellate judges in both the state and federal systems, legislators, law enforcement and corrections personnel, law students, and even an occasional law professor. The Minnesota State Bar Association has had the improvement of the administration of justice as a primary purpose during its century of existence.

At an annual meeting in 1981, the members of the Minnesota State Bar Association voted to oppose any effort to dilute the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961). Viewing the government's proposal for a "good faith/reasonable mistake" exception in *United States v. Leon* and other cases involving search and seizures without probable cause as an attempt to abrogate the paramount prohibition of the Fourth Amendment, the Minnesota State Bar Association reaffirmed its position and sought consent to intervene in the instant case.

The legal profession works for and, by its vigilance, protects nothing more precious than constitutional rights. At stake in the instant case, and in the government's attempt to engraft a "good faith/reasonable mistake" exception onto the Fourth Amendment, is our security against arbitrary government invasion—search and seizure without probable cause.

Crime, and particularly trade in narcotics, is a major concern throughout the nation. The membership of the Minnesota State Bar Association shares the concern and supports consistent and conscientious attempts to apprehend and convict individuals violating the law; but it does not support attempts to accomplish apprehension or conviction at the cost of rights drafted by the Framers of the Constitution and secured by the sacrifice of generations of Americans. The probable cause barrier that has existed between the government's desire to see and take, and the citizen's desire to hide and retain is among our most cherished rights, defining a unique relationship between the government and the citizen—freedom. It is that freedom that is the interest of the Amicus Curiae, Minnesota State Bar Association.

SUMMARY OF ARGUMENT

The "good faith/reasonable mistake" exception is not, as the government claims, an exception to the exclusionary rule of evidence; it is an exception to the explicit probable cause standard of the Fourth Amendment.

The Fourth Amendment defines the relationship between the government and the citizen, at least to the extent that it prohibits the former from search and seizure of the latter without probable cause.

If the government asks the Court to create an exception that will ignore probable cause in favor of what "a reasonably well-trained officer should have known," in order to "accommodate the practical realities of police work," it is disingenous to argue that its proposal goes only to a remedy and that the considerations are non-constitutional.

The government argument for a "good faith/reasonable mistake" exception depends upon the faulty premise that deterrence is the only rationale for the exclusionary rule. The precedents do not support the conclusion. They deal with derivative use, such as grand juries, and derivative evidence—"the fruit of the poisonous tree." The exclusive focus on deterrence in those cases is permissible only because vindication of the personal right to privacy is accomplished by exclusion of the government's illegally obtained evidence at the criminal trial. In derivative use cases the deterrence rationale requires the Court to employ its own cost-benefit analysis. When the rationale for exclusion is the vindication of the personal constitutional right to privacy, the Court is obliged to apply the exclusionary remedy in conformity with the Framers' original constitutional cost-benefit judgment.

If the government attempts to incarcerate a citizen by introducing, at a criminal trial, evidence it has discovered and taken from the citizen without probable cause, only the exclusion of that evidence will restore to the citizen that personal right to a protected position against the government that is guaranteed by the Fourth Amendment. No other remedy can vindicate the personal right. None of the arguments made against exclusion are applicable when the probable cause standard of the Fourth Amendment is at stake.

ARGUMENT

I.

THE "GOOD FAITH/REASONABLE MISTAKE" EXCEPTION IS NOT AN EXCEPTION TO THE EXCLUSIONARY RULE OF EVIDENCE; IT IS AN EXCEPTION TO THE EXPLICIT PROBABLE CAUSE STANDARD OF THE FOURTH AMENDMENT.

Whatever may be the case when a warrant is improperly completed or when a probable cause search is conducted without a warrant; in this case, and in *Colorado v. Quintero,* No. 82-1711, the government's contention for a "good faith/reasonable mistake" exception asks the Court to amend the language of the Fourth Amendment to provide:

> The right of the people to be secure . . . against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause *or a little bit less if the government's failure to meet the standard is not the result of mean spirit.* . . . (Amending language italicized.)

The government frames the issue in terms of an exclusionary rule that it claims is non-constitutional, and argues

from a deterrence rationale that it claims cannot be furthered when a government official's mistake is "reasonable" or in "good faith." It suggests that the Court has the policy discretion attendant "a judge-made rule of evidence" and that it is not burdened by the mandate that attaches to the enforcement of a constitutional right. The issue is wrong; the analysis is irrelevant; and the conclusion is erroneous.

Because the government fails to properly assess the scope of *United States v. Calandra,* 414 U.S. 338 (1974) and similar cases, it argues for a "good faith/reasonable mistake" exception to the probable cause standard by pressing a deterrence remedy analysis. When the search or seizure violates the Fourth Amendment for failure of probable cause, the questions are of rights and restoration, not of remedies and deterrence. If the government is to prevail in application of a "good faith/reasonable mistake" exception when probable cause is at stake, the exception must fit within the analytic framework of the right and its foundation, not within an analysis that speaks only to the remedy and its rationale.

The Fourth Amendment defines the relationship between the government and the citizen, at least to the extent that it prohibits the former from search and seizure of the latter without probable cause. It is not limited to police officers; it prohibits the entire government. It does not depend upon cost-benefit analysis, it is enforced because it is in the constitution:

> The basic purpose for the Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. (*Camara v. Municipal Court,* 387 U.S. 523 at 528 (1967).

The line between "arbitrary invasions by government officials" and permitted search and seizure is marked by probable cause. "Probable cause," said Justice White, "is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." *(Id.* at 534).

Although the government purports to attack a non-constitutional exclusionary rule with its "good faith/reasonable mistake" exception, its arguments do not relate specifically to the exclusionary rule, but to the existence of any remedy. Indeed, the government makes a single argument for cases in which there is a failure of probable cause, whether or not there is a warrant.

> Application of the exclusionary rule in *(Quintero)* is thus ineffective, because of the greatly diminished potential for deterrence when the police conduct themselves in a manner they believe to be lawful. . . .
>
> . . . *Leon* demonstrates that the purpose (to deter police misconduct) cannot be advanced when law enforcement officers have done exactly what is demanded of them by obtaining a judicial search warrant and acting according to its terms. (Brief of the United States, hereinafter "Govt. Brief," 21).

The "good faith" name for the proposed exception and the deterrence argument, upon which the government relies, suggest that if an officer actually believes his conduct conforms with the Fourth Amendment, the officer cannot be deterred. Having used the officer's actual belief to "prove" the appropriateness of deterrence analysis for exclusionary rule issues, the government then abandons what the officer thinks and embraces an "objective" standard that is blind to what the particular officer actually thinks.

The result, of course, is to change "probable cause" from a legal standard determined and reviewed by judges, to an ad hoc standard determined by the law enforcement version of the "reasonable person." Indeed, the government admits as much:

> Moreover, the objective nature of the inquiry will protect the judicial system against unduly burdensome and generally irrelevant inquiries into the subjective state of mind . . . a court will need to determine only *whether a reasonably well-trained officer should have known,* in light of the extant principles of law, that this conduct was prohibited. (Govt. Brief 25) (Emphasis added).

It goes so far as to suggest that the courts should ignore the probable cause requirement unless it is predictable.

> . . . society has little interest in 'deterring' the police from solving or preventing crime under circumstances in which the Fourth Amendment violation, if any, could not reasonably have been predicted. (Govt. Brief 21).

The government pushes the point to the extent that it suggests that the court should restrike the line between arbitrary invasion and permitted search because probable cause may be too tough a standard.

> But the facts in . . . *Quintero* well illustrate (a situation) in which the exclusionary rule should be modified to *accommodate the practical realities of police work. (*Govt. Brief 48) (Emphasis added).

If the government asks the Court to create an exception that will ignore probable cause in favor of what "a reasonably well-trained officer should have known," in order to

"accommodate the practical realities of police work," it is disingenous to argue that its proposal goes only to a remedy and that the considerations are non-constitutional. The right to be secure against searches without probable cause is being altered, and the Court cannot do that without an analysis that speaks to the right.

Retired Justice Potter Stewart made the point in a recent article, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 Colum. L. Rev. 1365 (1983). In response to those who criticize the exclusionary rule for freeing those who might be guilty of crime, he distinguishes the situation in which there is no probable cause, pointing to the Amendment:

> (I)n many of the cases in which exclusion is ordered, police officers would not have discovered the evidence at all if they had originally complied with the fourth amendment. *Where that is the case, the "culprit," if blame for the dismissal is to be assessed, is the fourth amendment to the Constitution, not the exclusionary rule.* The drafters of the fourth amendment determined that government agents would be deprived of the power to engage in certain investigative activities because those activities threaten the personal security of all men and women. A necessary implication of that limitation is that fewer criminals will be apprehended. (*Id* at 1394) (Emphasis added).

The lynchpin of the government argument is that "the only viable justification for the exclusionary rule is its presumed deterrent effect on unlawful police conduct." (Govt. Brief 31). It is the assumption that only deterrence justifies the rule that allows the government to argue that the Court is in a position to do a cost-benefit analysis—an analysis

which, if the issue is constitutional, is beyond the Court's power. The government then spends the majority of its effort in persuading the Court that a reasonable mistake is undeterrable, or if deterrable, not worth the candle.

The argument depends upon the faulty premise that deterrence is the only rationale for the exclusionary rule.

> The rise to preeminence of the exclusionary rule's deterrent purpose reflects abandonment of earlier justifications. Initially, the rule was justified as a remedy for the violation of an accused's personal Fourth Amendment right of privacy. *Weeks*, 232 U.S. at 398. *This rationale has since been repeatedly and squarely rejected by the Court.* (e.g. *Calandra*, 414 U.S. at 347; *Linkletter v. Walker*, 381 U.S. 618, 637 (1965). (Govt. Brief 33) (Emphasis added).

On close examination, neither *Calandra* nor *Linkletter*—the only cases cited by the government—support its position.

Linkletter v. Walker, 381 U.S. 618 (1965), dealt with retroactivity, a question that assumed the constitutional nature of the rule about which the retroactivity issue was raised. Justice Clark, the author of *Mapp v. Ohio*, 367 U.S. 643 (1961), raised no objection from any member of the Court, including the *Linkletter* dissenters, when he said that the *Mapp* Court "affirmatively found that the exclusionary rule was 'an essential part of both the Fourth and Fourteenth Amendments.'" (381 U.S. at 634) Far from "squarely reject(ing)" *Weeks*, and *Mapp*, for that matter, *Linkletter* reaffirms them. *United States v. Johnson*, 457 U.S. 537 (1982), a later retroactivity case concerned with the Fourth Amendment precedent, and explaining *Linkletter*, specifically rejects any "good faith/reasonable

mistake" exception to the retroactive application of Fourth Amendment exclusionary rules. (*Id.* at 559)

Calandra, the other case cited by the government, is indeed based on deterrence, but only because it is a derivative use case. "[D]erivative use," said Justice Powell, "presents a question not of rights, but of remedies." (*Id.* at 354) It was derivative use that allowed him to concentrate solely on deterrence and hold that the exclusionary rule—not the Fourth Amendment—should not operate to bar grand jury questions based upon illegally obtained evidence. One need not accept Justice Powell's resolution of the deterrence question to agree that deterrence is the proper analytic approach to derivative use questions. In addition to the holding, concerning grand jury questions, the major dictum in the case—that the exclusionary rule would not bar grand jury use of the illegally obtained evidence, itself —depended upon the nature of the grand jury as a charging mechanism. Justice Powell was careful to specifically except the question of suppression at the criminal trial from the opinion. (*Id.* at 348) It was on the basis of that exception that he could limit the opinion to exclusionary issues that turned on deterrence "rather than a personal constitutional right of the party aggrieved." *(Id.)* The consequent certainty that the defendant's rights would be vindicated by exclusion at the criminal trial, allowed his dictum that the direct fruits of the illegal search could be used when only charging was at issue. (*Id.* at 354 n.10.)

Calandra does not "squarely reject" the proposition that the exclusionary rule may be "justified as a remedy for the violation of an accused's personal Fourth Amendment right of privacy." Quite the contrary, it depends on the vindication of the personal right rational for the rule at the crim-

inal trial to permit the exclusive concentration on the deterrence rationale for derivative use situations.

The government fails to distinguish between cases involving vindication of the personal right and those involving deterrence when it suggests that the Court always "employs a cost-benefit analysis whenever it considers whether the rule should be applied to particular situations." (Govt. Brief 19) (citing, e.g., *United States v. Havens*, 446 U.S. 620 (1980); *United States v. Ceccolini*, 435 U.S. 268 (1978); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *Calandra*, 414 U.S. 338; *Alderman v. United States*, 394 U.S. 165 (1969)).

United States v. Havens, 446 U.S. 260 (1980) is a case involving waiver of rights by the decision to be a witness. It does not demonstrate that cost-benefit analysis is always employed in exclusionary rule cases. The government was not allowed to offer the illegally obtained evidence in its case in chief against Havens. His personal constitutional right to keep property from the possession and use of the government when the latter has no probable cause required the exclusion. When, however, the defendant chose to change the relationship between himself and the government as an adversary, and chose to testify—and to lie—he waived the protection that the Constitution provided to him personally. The case involves an application of the fundamental rule that a testifying defendant waives many trial vindicated constitutional rights that could have been preserved by exercising the right not to participate as a witness, as well as serving as an example of the "personal constitutional right" to exclusion which only the defendant can waive.

United States v. Ceccolini, 435 U.S. 269 (1978) involved a "fruit of the poisonous tree" derivative evidence prob-

lem—deterrence was the issue. *Stone v. Powell*, 428 U.S. 456 (1976) was a habeas corpus case in which the holding assumed a "full and fair" hearing before state courts with an obligation equal to the Federal courts' to enforce the Fourth Amendment by the exclusion of evidence at criminal trials. *United States v. Janis*, 428 U.S. 433 (1976) involved federal civil use of evidence illegally obtained by state officers—deterrence was the issue, and at two levels. *Alderman v. United States*, 394 U.S. 165 (1969) refused to extend the rule to defendants whose Fourth Amendment rights were not violated—deterrence was the issue—and did so on the explicit premise that only a defendant asserting a personal right could constitutionally insist upon exclusion:

> We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.

The Court employs its own cost-benefit analysis only in those circumstances in which deterrence is the sole basis for exclusion. When the rationale is vindication of the personal constitutional right, the Court is obliged to apply the exclusionary remedy in conformity with the Framers' cost-benefit analysis.

The Court's obligation to enforce the probable cause standard is inconsistent with a "good faith/reasonable mistake" exception. The government's assertion that "the costs of the exclusionary rule outweigh its benefits" when the well-trained officer conducts a search without probable cause, either with or without a warrant, (Govt. Brief 38, 57) is simply a request that the Court substitute its judg-

ment for that of the Framers. The probable cause standard is the result of a constitutional cost-benefit analysis that the Court may not alter, no matter its belief about how badly the Framers weighed the costs and benefits in making their judgment. The Chief Justice has spoken eloquently to the point in the context of a legislative judgment that preferred the snail darter to the Tellico Dam. He required the courts to exercise their remedial power to give meaning to the legislative act, even though the substance of the act may have flown in the face of the Court's common sense. His explanation, transferred from legislative to constitutional judgment, articulates the limitation on the Court's ability to alter a constitutional judgment to which it believes "good faith" should be an exception.

> Once (the Constitution) . . . has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought.
>
> Here we are urged to . . . shape a remedy 'that accords with some modicum of common sense and the public weal.' But is that our function? (W)e have (no) mandate from the people to strike a balance of equities. . . (The Constitution) has spoke in the plainest of words, making it abundantly clear that the balance has been struck in favor of (probable cause) . . .
>
> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the (Framers) is to be put aside in the process of interpreting (the Constitution). *(TVA v. Hill,* 437 U.S. 153 at 1974 (1977)).

The Court's opinions in Fourth Amendment cases have consistently reflected the Chief Justice's view of the Court's obligation to enforce legislative or constitutional mandate.

Despite the "disagreement among Justices as to the extent to which the (Warrant) Clause defines the reasonableness standard of the Amendment," noted by Justice Powell in *Texas v. Brown*, No. 81-419, 33 CrL 3001 at 3005 (1982), there has never been disagreement about the inflexibility of the probable cause requirement for searches and seizures in a criminal case. To be sure, Justice Stevens, dissenting in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1977), chastised the majority for suggesting that the probable cause requirement might be relaxed in a non-criminal context based upon the Court's belief that the governmental need to conduct a category of searches outweighed the intrusion on Fourth Amendment interests.

> The Court's approach disregards the plain language of the Warrant Clause and is unfaithful to the balance struck by the Framers of the Fourth Amendment. . . . (Id. at 327)

Justice White, whose opinion identified different components to probable cause in a civil matter, has himself, been vigorously protective of the probable cause standard in the criminal context. In his *Camara* opinion, the forerunner of *Marshall*, Justice White went to great length to separate the criminal from the non-criminal before suggesting that probable cause was ever a flexible concept. He was unrelenting in his assertion that, in the criminal context, probable cause was a prerequisite to a search, even for contraband.

> In cases which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . . For example, in a criminal investigation,

> *the police may undertake to recover specific stolen or contraband goods. . . . a search for these goods, even with a warrant is 'reasonable' only when there is 'probable cause'* to believe that they will be uncovered in a particular dwelling. (*Camara v. Municipal Court*, 387 U.S. at 534, 535) (Emphasis added).

Only the Court can guard the Constitution when the executive attacks it.

II.

EXCLUSION IS THE CONSTITUTIONALLY REQUIRED REMEDY WHEN THE GOVERNMENT'S EVIDENCE IS THE RESULT OF A SEARCH WITHOUT PROBABLE CAUSE. BECAUSE THE REMEDY IS TO RESTORE A PERSONAL RIGHT, THE "GOOD FAITH" OF THE GOVERNMENT IS IRRELEVANT.

If the government attempts to incarcerate a citizen by introducing, at a criminal trial, evidence it has discovered and taken from the citizen without probable cause, only the exclusion of that evidence will restore to the citizen that personal right to a protected position against the government that is guaranteed by the Fourth Amendment. The government's argument against exclusion is based upon the officer's "good faith," and the inability of the exclusionary remedy to deter a subsequent "good faith" mistake. The argument proves too much, and in doing so demonstrates that deterrence is irrelevant to the inquiry.

If it is true that the exclusion of evidence at trial would be unfair to an officer or to a magistrate whose search or authorization to search without probable cause was the result of a failure to accurately predict the law, any action

against the individual officer or magistrate would be even worse. A tort remedy would do nothing to guarantee to the citizen the benefit of the relationship with the government proclaimed by the Fourth Amendment, and would penalize a law enforcement officer who was acting diligently. The same is true of any administrative proceeding, except that it would do nothing for the citizen and only punish the "innocent" officer. The government's deterrence argument, if correct, prohibits any remedy if the government activity is without mean spirit.

The premise, of course, is wrong. The Fourth Amendment is not a prohibition against a government with bad motives; it prohibits a government with too little evidence. The "remedial objectives" that need, in Justice Powell's terms, to be "efficaciously served," relate to the loss of protection for the citizen on trial, not to some future conduct of some unknown officer. It may be that a continuous course of remedy against prohibited action will assist in shaping future conduct—our criminal law is based upon the assumption—but that is not the only objective of remedies. In the instant case, or in any other where probable cause does not exist, an injunction would surely issue to prohibit the search, the seizure, or the continued government possession if the individual citizen could know about the application for warrant and reach a judge beforehand. If the citizen lost, the matter would surely be appealable. Even *Wolf v. Colorado,* 338 U.S. 25 (1949) recognized that the Fourth Amendment was not merely hortatory, and that it provided the basis for a legal remedy of some kind. If the citizen could bring the matter before a judge, only the level of evidence would matter. The existence of probable cause—that barrier to government action—would be

the only issue. The character of the citizen and the motives of the officer would be irrelevant. The government concedes as much.

Just last term in *Illinois v. Gates*, No. 81-430 (June 8, 1983) the Court reiterated that the issue of probable cause was properly one for judicial determination and review. Such determination and review must exist so that the court can settle cases and controversies between parties with something at stake.

What the citizen has at stake is the right to be secure against arbitrary action against the citizen calculated to alter the relationship between the citizen and his or her government. No tort remedy nor administrative proceeding against the officer can restore the relationship between the citizen and the government that existed before the government's arbitrary action. Exclusion of the evidence that the government would not have, if it had not acted arbitrarily, would come close to fully restoring the citizen and the government to the *status quo ante*. Although the indignity of the search, if any there be, cannot be undone, exclusion prohibits the government as adversary from changing its relationship with the citizen. Ultimately, it is the guarantee of the relationship that the Fourth Amendment protects; and it is that guarantee that the citizen has at stake.

The Amendment contemplates an adversarial relationship between the citizen and the government, one in which the citizen has something that he or she does not want the government to know about, have, or use against the citizen. It guarantees that the government will not change that relationship, and gain advantage over the citizen, without first having probable cause. In a criminal trial, with direct use of the illegally seized evidence, the Fourth Amendment relationship between the citizen and government is altered

by the introduction of the evidence. The *Weeks* Court recognized that use was as much a violation of the Amendment as the seizure when it observed:

> If (property) can thus be seized and held and *used* in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. (232 U.S. at 393) (Emphasis added).

The government makes no arguments in favor of the "good faith/reasonable mistake" exception that meet the objection that the result of the application is approval of searches without probable cause.

The contention that exclusion "allows '[t]he criminal . . . to go free because the constable has blundered.' " (Govt. Brief 22, 23) suggests that the government has lost something because of the ineptitude of its agents. Unlike the situation in which an officer with probable cause fails to take the next step to get a warrant, and thereby, "blunders," the failure of probable cause case has nothing to do with "blundering."[1] In this case, for example, the officers con-

---

[1]The Court's general approach to warrantless searches has been to hold a search unreasonable unless there is a warrant or the existence of an exception to the requirement. Whether an officer's "good faith/reasonable mistake" should be an exception to the warrant requirement—given the existence of probable cause—is a question that is not presented and that involves other important issues. Whether an exception should not exist unless "justified by absolute necessity" (Frankfurter, J. dissenting, *United States v. Rabinowitz*, 339 U.S. 56 at 70 (1950) or whether it should join one of those "few in number and carefully delineated," (Powell, J., *United States v. United States District Court*, 407 U.S. 297 at 318 (1972) requires an analysis of the history of the Fourth Amendment as well as the likely result of the police conduct if this potentially eviscerating exception is engrafted onto the warrant clause. The "blunder" argument is an appropriate consideration in deciding that question because, among other things, the result, if it prevails, is not a search without government adherence to the probable cause standard.

ducted a long investigation, and detailed everything in the application for warrant. They did not "blunder," they just did not have enough incriminating information to justify a search of Leon's house—a circumstance that the Fourth Amendment contemplated and for which it prohibited a search. There is a "blundering" issue. The only question is whether the Fourth Amendment should validate a search when the world has been parsimonious with evidence and, thus, provided the officer with less than probable cause.

The contention that exclusion "benefits only those who otherwise would be found guilty" (Govt. Brief 22) ought to be immediately ignored in discussing the creation of an exception to a constitutional standard. Justice Blackmun put the matter to rest in *United States v. Johnson*, 457 U.S. 537 (1982), quoting Justice Harlan who, also, undoubtedly thought the issue had been put to rest long before he spoke:

> We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. (*Id.* at 561)

If, on the other hand, the government is truly concerned that the exclusion affords no remedy for "innocent victims of unlawful police conduct" (Govt. Brief 23) it has the power to pass legislation to remedy the error.

The contention that the exclusion of evidence creates "the public perception that there is something wrong with a system of criminal justice that frees guilty defendants on technicalities," (Govt. Brief 23) captures the bankruptcy of the government's "good faith/reasonable mistake" proposal. It demonstrates not only the absurdity of a public

opinion poll approach to constitutional rights, but provides an example of the difference between this case and those of the nature of *Massachusetts v. Sheppard*, No. 82-963. The officers in *Sheppard* had probable cause and they made an application for warrant that was specific as to the places to be searched and the items to be seized. Whether the Court considers the magistrate's ministerial function in filling out the warrant improperly to be "harmless error" or merely a case in which there is no Fourth Amendment violation, *Sheppard* presents a "technicality." The government should be ashamed for suggesting that a search without probable cause—whatever the motive—is comparable to the technical failure in *Sheppard*. If a search without probable cause is a "technicality" to be shunted aside by the government's protestation of good motive, it will matter little what the public perception is of our system of criminal justice—we will have none.

CONCLUSION

The Minnesota State Bar Association respectfully submits that this Court should not amend the probable cause standard of the Fourth Amendment by allowing a "good faith/reasonable mistake" exception to the constitutional judgment of the Framers.

Respectfully submitted,

Ronald T. Seeger
President, Minnesota State Bar Association
Steven H. Goldberg
Suite 403
430 Marquette Avenue
Minneapolis, Minnesota 55401
(612) 333-1183
Bruce H. Hanley
Chairman, Criminal Law Section of the Minnesota State Bar Association
1750 First Bank Place East
Minneapolis, Minnesota 55402

APPENDIX

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

October 20, 1983

Bruce H. Hanley, Esquire
Hanley, Hergott & Hunziker
1750 First Bank Place East
Pillsbury Center
200 South Sixth Street
Minneapolis, Minnesota 55402

Re: United States v. Leon
No. 82-1771

Dear Mr. Hanley:

In response to your letter of October 13, 1983, I hereby consent to the filing of a brief amicus curiae on behalf the Minnesota State Bar Association in the Supreme Court in this case.

Sincerely yours,

/s/ Rex E. Lee
Solicitor General

Law Offices
Barry Tarlow
A Professional Corporation
9119 Sunset Boulevard
Los Angeles, California 90069

November 1, 1983

Mr. Bruce Hanley
Hanley, Hergott & Hunziker
1750 First Bank Place East
Pillsbury Center
200 South Sixth Street
Minneapolis, Minnesota 55402

RE: United States v. Leon
Supreme Court No. 82-1771

Dear Mr. Hanley:

This is to advise you that we consent on behalf of Respondent Leon to the filing of an amicus curiae brief by the Minnesota State Bar Association.

Very truly yours,

LAW OFFICES OF BARRY TARLOW
/s/ Barry Tarlow

BT:dlr